No. 17-130

In the
Supreme Court of the United States

RAYMOND J. LUCIA, et al.,
Petitioners,

v.

SECURITIES AND
EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise.

PLF is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

United States, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF supports the Petitioners in this case because it raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its powers. PLF's policy perspectives and litigation experience offer an additional viewpoint that will assist the Court in reviewing this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently reaffirmed the central judgment of the Framers that the "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 324 (James Madison) (J. Cooke ed. 1961).

Therefore, the liberty and security of the governed are threatened when the carefully balanced scheme of the Framers is not enforced.

In particular here, the question of whether SEC administrative law judges are Officers of the United States within the meaning of the Appointments Clause implicates the important principle that government must be accountable to the governed. *See Edmond v. United States*, 520 U.S. 651, 660 (1997) ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."); *Freytag v. Comm'r of Internal Revenue*,

501 U.S. 868, 878 (1991) ("The Appointments Clause not only guards against this encroachment [of one branch at the expense of the others] but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001) ("The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.") (internal quotation marks and citation omitted). *Cf. Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability.").

The lines of responsibility become blurred, and accountability for the exercise of power becomes less comprehensible, when Congress authorizes executive-branch employees to exercise duties of an "Officer of the United States" without subjecting their appointments to the strictures of the Appointments Clause. The growth of the Administrative State—with its ever-increasing oversight by individuals wielding significant power—demands accountability.

The decision below, if allowed to stand, would reduce that accountability. Petitioners were subjected to an administrative enforcement action initiated by the Enforcement Division of the Securities and Exchange Commission and conducted by an SEC Administrative Law Judge. Pet. App. 37a-38a. In this proceeding, Administrative Law Judge Cameron Elliot heard testimony, including expert-witness testimony; ruled on the admissibility of evidence; considered and ruled on objections; weighed evidence; made factual findings; and reached legal conclusions.

Id. at 115a-237a (ALJ Initial Decision on Remand). Judge Elliot ruled that Petitioners had violated the Investors Advisers Act of 1940, and he issued sanctions: permanently barring Petitioner Raymond Lucia from working as an investment advisor, revoking his (former) company's registration, and imposing civil penalties in the amount of $300,000. *Id.* at 235a.

Petitioners argued that this administrative proceeding was void on the ground that Judge Elliot was acting as an "Officer of the United States" even though he had not been appointed under the Appointments Clause. Despite this Court's jurisprudence—instructing that an "Officer of the United States" is "'any appointee exercising significant authority pursuant to the laws of the United States,'" *Freytag*, 501 U.S. at 881 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976))—a panel of the D.C. Circuit held that Judge Elliot was not an "Officer" within the meaning of the Appointments Clause. Pet. App. 9a-21a (disregarding *Freytag* and applying *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

Other circuit courts have reached the opposite conclusion about the nature of the ALJ office. In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), the court held that an SEC administrative law judge was an "Officer" because, as in *Freytag*, (1) the position was "established by law," (2) the duties, salary, and means of appointment were specified by statute, and (3) the ALJ "'exercise[d] significant discretion' in 'carrying out . . . important functions.'" *Id.* at 1179-82.

In *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017), the court granted a stay after concluding that the

plaintiff had a likelihood of success on the merits in establishing that an ALJ of the FDIC is an officer of the United States. Following *Freytag* and *Bandimere*, the court concluded that a government worker is an "inferior Officer" under the Appointments Clause if the "office entails 'significan[t] . . . duties and discretion[,]'" a determination based on "(1) whether the office is 'established by Law;' (2) whether the 'duties, salary, and means of appointment for that office are specified by statute;' and (3) whether the officeholder may '"exercise significant discretion" in "carrying out . . . important functions."'" *Burgess*, 871 F.3d at 302 (citations omitted).

This case presents the Court with an issue going to the heart of our constitutional structure: May Congress authorize administrative law judges from an executive-branch agency to conduct adjudicatory proceedings without providing for the proper appointments of those judges? That is, does the Constitution allow Congress to create offices in the Executive Branch without also requiring for the appointment of officers under the Appointments Clause?

It also gives the Court an opportunity to reconsider whether its recent "significant authority" standard complies with the Constitution's demand for government accountability. The Founders' emphatic concern with despotism in the form of a multitude of unaccountable offices suggests that this Court's recent "significant authority" test should be reconsidered. The Court's earlier formulation—that an officer is any individual who has ongoing responsibility for a governmental duty—is consistent with the Constitution's text and history and protects

the Framers' intentions with respect to the Appointments Clause.

Ultimately, this Court should reverse the D.C. Circuit's opinion and hold that the SEC's administrative law judges are "Officers of the United States."

ARGUMENT

I. THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT INDIVIDUAL LIBERTY

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than this: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 324 (James Madison) (J. Cooke ed. 1961).

To prevent tyranny, then, the Constitution divides the "powers of the . . . Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Article I vests "[a]ll legislative Powers . . . in a Congress of the United States[;]" Article II vests "the" executive power "in a President of the United States of America[;]" and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

"The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

But the Framers knew that these mere "parchment barriers" between the branches were not a sufficient guarantor of liberty. *The Federalist No. 48*, at 333 (James Madison) (J. Cooke ed. 1961). Therefore, the Constitution also "give[s] to each [branch] a constitutional control of the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id.* at 332. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 349 (James Madison) (J. Cooke ed. 1961).

In sum, so that individual liberty may be secured, the Constitution divides power into three branches but also gives to each branch certain powers to check the others:

> [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

The Federalist No. 48, at 332 (James Madison) (J. Cooke ed. 1961). *See also Metro. Wash. Airports Auth.*, 501 U.S. at 272 ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each.").

In particular, "because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism[,]'" "manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 79, 143 (1969)).

Thus, the Appointments Clause—itself a microcosm of the Constitution's Separation of Powers.

II. WITHOUT STRICT ENFORCEMENT OF THE APPOINTMENTS CLAUSE, PUBLIC ACCOUNTABILITY AND INDIVIDUAL LIBERTY ARE THREATENED

A. The Appointments Clause Was Intended To Limit Both Executive and Legislative Power

The Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. It "embodies both separation of powers and checks and balances." *Bandimere*, 844 F.3d at 1172 (citation omitted). The Clause separates power by "defining unique roles for each branch in appointing officers." *Ibid.* And it

ensures checks and balances by preventing appointments without the cooperation of the Executive and Legislative branches. The President may appoint principal officers only upon Senate approval. U.S. Const. art. II, § 2, cl. 2. "Inferior Officers" may be appointed, upon congressional authorization, only by the President alone, the Heads of Departments, or the Courts of Law. *Id.*

Of course, under the Necessary and Proper Clause, Congress may create "offices" and establish their duties. *See Buckley*, 424 U.S. at 38. But the Constitution "does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher*, 478 U.S. at 722. Once Congress has "ma[de] its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.* at 733-34 (citing *Chadha*, 462 U.S. at 958). *See also Freytag*, 501 U.S. at 880 (The Appointments Clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 516 (2010) (Breyer, J., dissenting) (The separation-of-powers "principle, along with the instruction in Article II, § 3 that the President 'shall take Care that the Laws be faithfully executed,' limits Congress' power to structure the Federal Government."); *Myers v. United States*, 272 U.S. 52, 163-64 (1926) ("[A]rticle 2 grants to the President the executive power of the government—*i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a

conclusion confirmed by his obligation to take care that the laws be faithfully executed.").

But here, Congress has avoided the strictures of the Appointments Clause by granting to the agents of administrative agencies vast authority without designating those employees as "Officers" within the meaning of the Appointments Clause.[2] In this way, Congress has "'mask[ed], under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,' *[The Federalist] No. 48*, p. 310 [(C. Rossiter ed. 1961)] (J. Madison), and thus control[s] the nominal actions (*e.g.*, appointments) of the other branches." *Freytag*, 501 U.S. at 906 (Scalia, J., concurring in part and concurring in the judgment) (citing Thomas Jefferson, *Notes on the State of Virginia* 120 (William Peden ed. 1955)).

And by thus removing from the President (or department heads or courts of law) the power to appoint officers, Congress has arrogated to itself significant Executive power—a danger the Framers sought to prevent. *See Chadha*, 462 U.S. at 947 (explaining that the Framers recognized the particular "'propensity'" of the legislative branch "'to invade the rights of the Executive'") (quoting *The Federalist No. 73*, at 494 (Alexander Hamilton) (J. Cooke ed. 1961). *See also Ryder v. United States*, 515 U.S. 177, 182 (1995) (The Appointments Clause is a

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[2] As Petitioners note, Congress refers to the SEC's administrative law judges as "officers." *See* Pet. Br. 3. But Congress does not require that these "officers" be appointed under the Appointments Clause.

"bulwark against one branch aggrandizing its power at the expense of another branch.").

B. The Appointments Clause Was Also Intended To Limit the Diffusion of the Appointment Power To Protect the Governed and Increase Accountability

The limits set forth in the Appointments Clause do not exist simply to settle inter-branch squabbles over control of the government. Rather, these limitations go to the heart of a self-governing people. As the Framers understood, "by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. And the appointment of "Officers" under the Appointments Clause was one means of holding the President accountable: the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame." *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting).

Whom should Mr. Lucia blame? He and his (former) company were subjected to a proceeding affecting his fundamental right to pursue an avocation. *See Cummings v. Missouri*, 71 U.S. 277, 321-22 (1866). This proceeding, however, was initiated by agents of the SEC and overseen by another agent of the SEC. And the ALJ who presided over this proceeding wielded significant authority—permanently barring Mr. Lucia from working as an investment adviser—despite not having been appointed under the Appointments Clause. Is Congress to blame for establishing this administrative process? Or is the President

accountable for administering the laws against Petitioners? Mr. Lucia, and others facing the ever-growing Administrative State, should not have to guess whom to hold accountable. *See Ass'n of Am. R.R.s*, 135 S. Ct. at 1234 (Alito, J., concurring) ("Liberty requires accountability."). *See also Free Enterprise Fund*, 561 U.S. at 499 ("Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.").

Indeed, precisely because bureaucracy is the "ultimate black box of government—the place where exercises of coercive power are most unfathomable and thus most threatening[. . .]—the need for transparency, as an aid to holding governmental decisionmakers to account, here reaches its apex." Kagan, *supra*, at 2332.

This Court should reverse the opinion below and reinforce the doctrine of Separation of Powers, which was established to protect the people's liberties and ensure justice. *See Freytag*, 501 U.S. at 870 ("The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government.").

III. THIS CASE SHOWS THE DANGER OF UNACCOUNTABLE GOVERNMENT AND THE GROWING THREAT OF THE ADMINISTRATIVE STATE

A. The SEC's ALJs Exercise "Significant Authority" and, Therefore, They Are Inferior Officers Subject to the Appointments Clause

Freytag and *Buckley* require the reversal of the D.C. Circuit's opinion. According to those cases, an "Officer of the United States" is "'any appointee exercising significant authority pursuant to the laws of the United States,'" and they "'must, therefore, be appointed in the manner prescribed by'" the Appointments Clause. *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126). In *Freytag*, this Court concluded that the office of "special trial judge" within the U.S. Tax Court had been "established by Law" (the "duties, salary, and means of appointment for that office are specified by statute"); and that these special trial judges exercised significant discretion in carrying out their "important functions" (taking testimony, conducting trials, ruling on admissibility of evidence, and having power to enforce compliance with discovery orders). *Id.*, 501 U.S. at 881-82. Further, because of these "significant" authorities, the judges' inability to enter final decisions was not, contrary to the D.C. Circuit's opinion, dispositive. *Ibid.* Therefore, special trial judges are "inferior Officers" within the meaning of the Appointments Clause.

The same conclusion applies to the SEC's ALJ here. Congress not only refers to SEC ALJs as "officers of the Commission," 15 U.S.C. §§ 77u, 78v, 80a-40,

80b-12, but Congress has also established their duties and salary by law, 5 U.S.C. §§ 556-557 (duties), 5372(b) (salary). Further, as noted above, Administrative Law Judge Cameron Elliot exercised "significant authority" in the proceeding at issue: he heard testimony, including expert-witness testimony; ruled on the admissibility of evidence; considered and ruled on objections; weighed evidence; made factual findings; reached legal conclusions; permanently barred Mr. Lucia from working as an investment advisor; revoked his (former) company's registration, and imposed civil penalties in the amount of $300,000. Pet. App. 115a-237a (ALJ Initial Decision on Remand). Accordingly, the Court should hold that SEC ALJs are inferior officers, subject to the Appointments Clause.

B. This Court Should Reconsider Its "Significant Authority" Test, Which Is Inconsistent with the Constitution and This Court's Early Jurisprudence

1. The Expanding Administrative State Requires Accountability

Mr. Lucia's predicament is, of course, just one example of the threat posed to individual liberty by an unaccountable Administrative State.[3] Congress's unilateral establishment of offices, which Congress intended to be filled outside of the Appointments Clause, creates the very dangers that the Framers sought to avoid: the diffusion of the appointment power and the accompanying decrease in

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[3] Mr. Lucia's administrative odyssey began in 2012, when the SEC initiated its enforcement action. Pet. App. 116a. He has lost his company and is near bankruptcy. Pet. Br. 58.

accountability. As the Administrative State expands, these concerns only grow, because of the increased likelihood that its power "slip[s] from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U.S. at 499.

To be sure, a reversal of the D.C. Circuit's opinion will be a step in the right direction: requiring that SEC ALJs be appointed under the Appointments Clause will limit the diffusion of appointment power and increase the accountability for the ALJs' actions. But this step does not go far enough—as the circuit courts' disparate understandings of "significant authority" demonstrates. This Court should take this opportunity to reconsider that "significant authority" standard, which still allows Congress and the President to avoid the Appointments Clause and staff the Administrative State with millions of employees who can "wield[] vast power" over "almost every aspect of daily life." *Free Enterprise Fund*, 561 U.S. at 499.

2. An Employee Need Not Exercise "Significant" Authority To Be an "Officer" Under the Appointments Clause

A definition of "officer" that is faithful to the Constitution and this Court's earlier jurisprudence is as follows: any federal employee who has "ongoing responsibility for a governmental duty." Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 Stan. L. Rev. 443, 450 (2018) (footnote omitted).

This definition would necessarily result in the recognition of more offices that must be filled (only) through the Appointments Clause. But any resulting

"inconvenience" creates no *constitutional* difficulty. As this Court stated long ago, the appointment of principal officers "requires a nomination by the President and confirmation by the Senate. But *foreseeing that when offices became numerous*, and sudden removals necessary, this mode might be inconvenient," the Constitution provided Congress with the authority to vest the power to appoint inferior officers in the President alone, in the courts of law, or in the heads of departments. *United States v. Germaine*, 99 U.S. 508, 509-10 (1878) (emphasis added).[4]

Further, *Germaine* and other early cases support the broad, "non-significant authority" definition suggested above. In *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867), for example, this Court held that an "office" is a "public station, or employment,

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[4] Thus, the Appointments Clause itself provides a more convenient method to appoint inferior officers: The "obvious purpose" in authorizing Congress to vest appointment power of "inferior Officers" in the President alone, in the Courts of Law, or in the Heads of Departments, is "administrative convenience." *Edmond*, 520 U.S. at 660 (citing *Germaine*, 99 U.S. at 510). But the Constitution permits no further "convenience."

More generally, as this Court has repeatedly affirmed, "'that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Free Enterprise*, 561 U.S. 499 (citations omitted). *See also Chadha*, 462 U.S. at 959 (explaining that there is "no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.").

conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *Id.* at 393. Notably, *Hartwell's* formulation does not include a requirement that an employee exercise "significant" authority before being an Officer of the United States:

> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

Ibid.

According to *Germaine*, "officers" means "all persons who can be said to hold an office under the government" of the United States. *Id.*, 99 U.S. at 510. And it relied on *Hartwell* when it identified the "nature" of the employment that makes it an "office": tenure, duration, emolument, and duties. *Germaine*, 99 U.S. at 511 (citing *Hartwell*).

As these cases show, the key factor in determining whether an employee is an Officer of the United States is whether that employee has a *duty* to carry out a function (of the federal government). *See* Mascott, *supra*, at 463 (The "application of [a duty] standard in fact is consistent with the outcome of numerous Supreme Court decisions evaluating

Article II officer status.") (footnote omitted).[5] The duty or duties of an officer must be ongoing and established by law, of course. *See Freytag*, 501 U.S. at 881 (noting that the office of special trial judge was "'established by Law,' Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute.") (citing *Burnap v. United States*, 252 U.S. 512, 516-17 (1920), and *Germaine*, 99 U.S. at 511-12).

But the duties need *not* be significant.

The *Bandimere* opinion was thus able to identify numerous positions, involving less-than-significant responsibilities, previously held to be "Officers" by this Court:

- a district court clerk, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839);
- an "assistant-surgeon," *United States v. Moore*, 95 U.S. 760, 762 (1877);

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[5] As Mascott explains, the "element of duty was significant to the outcome" of *Germaine*: "[T]he official under consideration had only 'occasional and intermittent' duties; thus he was not an officer. The Court expressed no concern with whether the relevant duties were significant or involved discretion or final decisionmaking power. Rather, the opinion seemed to intimate that if the relevant official had maintained 'continuing and permanent' duties, the Court would have considered him an Article II officer." *Id.*, *supra*, at 463 (footnotes omitted).

The importance of an employee's duty was recognized at common law. *See* Edward S. Corwin, *The President: Office and Powers 1789-1948*, at 83 (3d ed. 1948) ("Etymologically, an 'office' is an *officium*, a duty; and an 'officer' was simply one whom the King had charged with a duty.").

- "thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments, *Germaine*, 99 U.S. at 511;
- an election supervisor, *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879);
- a "cadet engineer" appointed by the Secretary of the Navy, *United States v. Perkins*, 116 U.S. 483, 484-85 (1886);
- a United States commissioner in district court proceedings, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931); [and]
- a postmaster first class, *Buckley*, 424 U.S. at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926));

Bandimere, 844 F.3d at 1173-74; *see id.* at 1174 (collecting additional examples). *See also* William Blackstone, 3 *Commentaries on the Laws of England* 327-46 (1765) (An "officer" includes "sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor."); Mascott, *supra*, at 450 (Traditionally, officers have "included even individuals with more ministerial duties like recordkeeping.") (footnote omitted).

3. Buckley's "Significant Authority" Standard Was Not Well Considered

In *Buckley*, the Court relied on language from the *Germaine* opinion in adopting its "significant authority" rule. *Germaine* explained that officers are

"all persons who can be said to hold an office." *Id.*, 99 U.S. at 510. *Buckley* used this precise language: "We think that the term 'Officers of the United States' as used in Art. II, [is] defined to include 'all persons who can be said to hold an office under the government,'" *Buckley*, 424 U.S. at 125-26 (quoting *Germaine*, 99 U.S. at 510). But *Buckley* continued in a cursory manner.

According to *Buckley*, the term "Officers of the United States" is "intended to have substantive meaning[,]" and the term's "import is that any appointee exercising *significant* authority pursuant to the laws of the United States" is an "Officer of the United States." *Buckley*, 424 U.S. at 126 (emphasis added). *Buckley* did not define "significant," nor did it explain why the "fair" import of the term "Officers of the United States" requires an employee's exercise of "significant" authority.[6]

Indeed, the very next paragraph in *Buckley* undermines the Court's inference. There, the Court supported its conclusion—that FEC commissioners were inferior officers—by comparing those offices to the offices of postmaster first class and a district-court clerk, both of which were held by this Court to be inferior officers under the Appointments Clause. *Id.*, 424 U.S. at 126 (citing *Myers*, *supra*, 272 U.S. 52, and *Ex parte Hennen*, 38 U.S. 225 (1839)). But it seems quite unlikely that either a postmaster first class or a district-court clerk would meet the "significant authority" standard.

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[6] In *Freytag*, the Court quoted this language from *Buckley* but likewise did not define "significant." *See Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126).

Further, *Buckley*'s stated distinction between officers and "mere" employees similarly lacks support from the cited authorities. According to *Buckley*, non-officer employees are "lesser functionaries subordinate to officers of the United States." *Id.*, 424 U.S. at 126 n.162 (citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), and *Germaine*, *supra*).[7] But neither *Auffmordt* nor *Germaine* holds that "mere" employees cannot be officers.

As noted above, in *Germaine*, the Court explained that the term "office" "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary." *Id.*, 99 U.S. at 511-12. The Court held that a surgeon was not an officer because his "duties [we]re *not* continuing and permanent, and they *[we]re* occasional and intermittent[;]" he acted "only . . . when called on by the Commissioner of Pensions in some special case[;]" he was "required to keep no place of business for the public use[;]" and "[n]o regular appropriation [wa]s made to pay his compensation." *Id.* But *Germaine* "expressed no concern with whether the relevant duties were significant or involved discretion or final decisionmaking power[,]" Mascott, *supra*, at 463, and *Germaine* therefore fails to show that a "lesser functionary" is—solely because of his presumed insignificant duties—a "mere," non-officer employee.

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[7] *Freytag* relied on this language. See *id.*, 501 U.S. at 880 (addressing whether "a special trial judge is only an employee," since "such 'lesser functionaries' need not be selected in compliance with the strict requirements of Article II") (citing *Buckley*, 424 U.S. at 126, n.162). Again, *Freytag* did not define the meaning of "lesser functionary."

Similarly, *Auffmordt* held that a "merchant appraiser" was not an officer because he was not a full-time employee, he was "selected for the special case[,]" and because he had "no general functions, nor any employment which ha[d] any duration as to time, or which extend[ed] over any case further than as he [wa]s selected to act in that particular case." *Id.*, 137 U.S. at 326-27. In short, the appraiser's position was "without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily." *Id.* at 327.

Auffmordt cited to several opinions that likewise allow for a "mere" employee to be an officer—so long as the employee acted "with[] tenure, duration, continuing emolument, or continuous duties, and act[ed] [not] occasionally and temporarily." *Ibid. See ibid.* (citing *United States v. Maurice*, 26 F. Cas. 1211, 1214 (Va. Cir. Ct. 1823) (Marshall, J.) (identifying nature of an officer as one with a "continuing" duty "defined by rules prescribed by the government, and not by contract," who has (non-contractual) duties that "continue, though the person be changed"); *Hartwell*, 73 U.S. at 393 ("The term ['office'] embraces the ideas of tenure, duration, emolument, and duties.") (holding that a clerk to an assistant treasurer in Boston was an officer); *Germaine*, 99 U.S. at 510, 511; *Hall v. Wisconsin*, 103 U.S. 5, 8 (1880) (The term "office" "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary.")).[8]

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[8] *Auffmordt* also cited *United States v. Smith*, 124 U.S. 525, 532 (1888), and *United States v. Mouat*, 124 U.S. 303, 307 (1888), but

Thus, contrary to *Buckley*'s apparent reading of this Court's earlier jurisprudence, this Court has held that "mere" employees can be officers as that term is used in the Appointments Clause. *See, e.g., Germaine*, 99 U.S. at 511 (describing, as officers, "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments responsible for "the records, books, & papers appertaining to the office").

4. Buckley Can Be Read Consistently with the Court's Early Case-Law

Perhaps *Buckley's* rather conclusory statements concerning "significant authority" and the purported distinction between officers and employees can be understood as *reaffirming* the Court's long-standing interpretation of the Appointments Clause. Thus, it is possible to read *Buckley* as saying that "significant authority" means "sovereign authority." *See, e.g.*, Kevin Sholette, Note, *The American Czars*, 20 Cornell J.L. Pub. Pol'y 219, 230 (2010) (arguing that *Buckley* "did not intend to depart from the historical understanding of what constitutes a public office[,]" and that therefore, "the phrase 'significant authority' is best understood as expressing the idea that exercising any 'sovereign authority' is a significant duty") (footnote omitted). *See id.* at 235 ("[T]he best definition for a federal 'officer' is someone vested with the duty of exercising sovereign authority of the United States, for the benefit of the public, except where that duty is only contractual, personal, or only occasional and intermittent."). *See also The Federalist*

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these case did not address the nature of an "officer." Rather, they held that a person who was not appointed under Appointments Clause cannot be an officer.

No. 72, at 487 (Alexander Hamilton) (J. Cooke ed. 1961) (explaining that persons "to whose immediate management [executive functions] are committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment").

A 2007 opinion from the Office of Legal Counsel supports this reading. *See* Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007). The OLC concluded that "a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the *sovereign* powers of the federal government, and (2) it is 'continuing.'" *Id.* at 73-74 (emphasis added). Recall that *Germaine* defined "officers" as "all persons who can be said to hold an office *under the government" of the United States*. *Id.*, 99 U.S. at 510 (emphasis added).

This reading is also supported by the historical foundations of the Nation and the Framers' fears of the diffusion of appointment power and the resulting decrease in accountability.

Among the Revolutionaries' charges against George III was that he had "erected a multitude of new Offices, and sent hither swarms of Officers to harass our people and eat out their substance." Declaration of Independence (U.S. 1776). At the Revolution, most Americans worried about excessive power in the executive. *See Freytag*, 501 U.S. at 883 ("[B]ecause 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism[,]'" "manipulation of official appointments had long been one of the American revolutionary generation's greatest

grievances against executive power.") (quoting Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 79, 143 (1969)). But by the time the Constitution had been drafted, Americans became concerned that despotism could arise from the Legislative Branch as well. *See, e.g., The Federalist No. 51*, at 351 (James Madison) (J. Cooke ed. 1961) ("If a majority be united by a common interest, the rights of the minority will be insecure.").

Does it matter whether the multitude of new offices includes only *significant* offices? Is it reasonable to suppose that the Framers objected to swarms of harassing officers only if they possessed *significant* authority? Cannot "swarms" of "mere" employees harass the people and eat out their substance with less than *significant* authority?

Further, as *Freytag* notes, the Appointments Clause "not only guards against th[e] encroachment [of one branch's power by another,] but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.*, 501 U.S. at 878. Would the Framers have intended for Congress (or the President) to be able to evade this structural concern through the pretext of establishing *insignificant* offices, to be staffed by *insignificant* employees? *See id.* at 880 (The Appointments Clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."); *Hartwell*, 73 U.S. (6 Wall.) at 393 (An "office" is a "public station, or employment, conferred by the appointment of government.").

To the contrary, staffing the Administrative State must be done with clear accountability in mind:

> The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." *The Federalist No. 72*, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

Free Enterprise Fund, 561 U.S. at 497-98. *See also Ass'n of Am. R.R.s*, 135 S. Ct. at 1234 (Alito, J., concurring) (arguing that the Appointments Clause "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people." (citing *Free Enterprise Fund*, 561 U.S. at 497-98)); *Buckley*, 424 U.S. at 271 (White, J., concurring in part and dissenting in part) ("The appointment power was a major building block fitted into the constitutional structure designed to avoid the accumulation or

exercise of arbitrary power by the Federal Government.").

As *Buckley* recognized, "*all* officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions." *Id.*, 424 U.S. at 132. Thus, the "prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers." *Edmond*, 520 U.S. at 660. This suggests that the "significance" of a position's authority is not a dispositive factor in determining whether a position in the federal government is an "office" subject to the Appointments Clause. Rather, as this Court has explained, "in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Thus, a return to the broad, duty-based standard of "Officer" would increase the accountability of the modern Administrative State. If Congress had to identify the means for the appointment of any employee with ongoing responsibility for a statutory duty under the federal government, it would likely engage in more careful consideration before creating "offices" and "officers." And the President would unmistakably bear the responsibility—and could not

pass the buck—for the conduct of all "officers" within the Executive Branch.[9]

The Court's more-recent formulation—that an "Officer of the United States" is "any appointee exercising significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126—ignores the common-sense statement in *Germaine* ("officers" means "all persons who can be said to hold an office under the government" of the United States, *id.*, 99 U.S. at 510); the early practice in our Nation's history; as well as the central theme of the separation of powers, namely, that the government must be accountable to the governed.

If Congress and the President can now staff the Executive Branch—outside the strictures of the Appointments Clause—with individuals who are accountable to neither the President nor the public, on the ground that only those employees who exercise some kind of "significant" authority are subject to the Appointments Clause, then the Framers' goals of separation of powers, checks and balances, and

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[9] While the Court has distinguished between officers and employees, "[i]t is certainly conceivable, perhaps even likely, that the Framers of the Constitution conceived only two classes of federal employ—the Officers and the inferior Officers." John M. Burkoff, *Appointment and Removal under the Federal Constitution: The Impact of* Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1338 (1976); *see id.* n.10 (noting that in 1973, the federal government's more than 14,000,000 employees represented 19% of all employment, while in 1801 the federal government had only 2,100 employees). *Cf. also* James Madison, 1 Annals of Cong. 463 (1789) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

accountable government are threatened, if not defeated.

* * *

While it may be possible to rule that Mr. Lucia should prevail even under the significant-authority standard, such a ruling would not solve the broader problems raised by Mr. Lucia's case. Indeed, Mr. Lucia's dilemma shows that the aggressive and growing Administrative State must be held more accountable. This accountability requires a return to the traditional understanding of "officer" as any federal employee with ongoing responsibility for a governmental duty. Accordingly, the Court should re-adopt the traditional definition of "officer" to protect the individual liberty and governmental accountability that lie at the heart of our Constitution generally and the Appointments Clause specifically.

CONCLUSION

The "purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 654 (Scalia, J., dissenting). And the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. While each branch's interpretation of its own powers is entitled to "great respect," in the end, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

With these precepts in mind, this Court should reverse the opinion of the D.C. Circuit and hold that SEC administrative law judges are officers of the United States whose positions are subject to the strictures of the Appointments Clause. And to ensure accountability in the future, the Court should return to the traditional understanding of "officer" as any federal employee with ongoing responsibility for a sovereign, governmental duty.

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Respectfully submitted,

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